IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-648

IN THE MATTER
OF
FRED G. MORITT,

Appellant,

-against-

EXTRAORDINARY SPECIAL AND TRIAL TERM OF THE SUPREME COURT, COUNTY OF KINGS, HON. JOHN M. MURTAGH, as Presiding Justice of the Extraordinary Special and Trial Term, HON. MAURICE H. NADJARI, as Special Deputy Attorney General, LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Appellees

On Appeal from the Supreme Court of the State of New York, Appellate Division, Second Judicial Department

BRIEF ON BEHALF OF APPELLANT OPPOSING MOTION TO DISMISS OR AFFIRM APPEAL.

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BRIEF ON BEHALF OF APPELLANT OPPOSING MOTION TO DISMISS OR AFFIRM APPEAL

Preliminary Statement

This brief is respectfully submitted in support of appellant's Jurisdictional Statement heretofore filed, and in opposition to appellees' motion to dismiss or affirm the within appeal.

Decisions Below

The judgment of the New York Supreme Court of the State of New York Appellate Division, Second Judicial Department, entered December 27, 1975, is reported in *46 App.Div. 2d 1012*. The order and memorandum decision of the New York Court of Appeals, dismissing the appeal taken as of right on constitutional grounds, entered June 4, 1975, is reported in *36 NY 2d 911*. The order of the New York Court of Appeals denying reargument, and the order denying leave to appeal, both entered September 10, 1975, are as yet unreported.

Jurisdiction

Notice of appeal to this Court was duly filed in the New York Supreme Court, Appellate Division, Second Department, on September 29, 1975.

The jurisdiction of this Court to review this final judgment by direct appeal is conferred by Title 28 United States Code Sec. 1257(2).

Statutes Involved

The state statutes involved, as set forth in the Jurisdictional Statement, are as follows: Section 149, subdivisions 1 and 2, Judiciary Law of the State of New York; Article 6, Section 27 New York State Constitution; Section 63 Executive Law of the State of New York, as applied; Article 6, Sec. 28 New York State Constitution, as applied (App. B, pp. 34-42).

Questions Presented

1. Is a state statute and constitutional provision, authorizing the governor to create and appoint an extraordinary term of the supreme court and to designate the special justice who shall preside therein—and further empowering the governor to terminate the assignment of such justice at will, and at any time, and to designate another justice in his place—facially violative of the independence of the judiciary and the Separation of Powers

guaranteed against encroachment by the 5th and 14th Amendments of the Constitution?

2. Is a state statute which substantially diminishes the substantive procedural rights of all litigants in the appellee Extraordinary Term Court, by requiring that all preliminary motions and pre-trial proceedings be brought exclusively in such court, before a judge specially designated by the Governor, and summarily removable at the will, whim or caprice of the Governor, and which further prescribes that in the alternative, in the exercise of discretion by a justice of the appellate division of the Supreme Court, such pre-trial motions may be entertained by the appellate division, facially violative of the equal protection of the laws guaranteed under the 5th and 14th amendments of the Constitution, as compared to the unrestricted pre-trial procedural rights accorded all other litigants in the regular criminal terms of the Supreme Court?

3. Where a state statute expressly requires that the independently-elected constitutional office of the Attorney General of the State of New York appear in person, or by one of his deputies, before the Extraordinary Term of the Supreme Court to manage and conduct all proceedings therein, may the Governor constitutionally dictate the choice and personally designate a special prosecutor to manage and conduct all proceedings in the appellee Extraordinary Term of the Supreme Court, particularly where the presiding justice thereof was likewise personally designated by and was summarily removable at will by the Governor?

4. Is a state prosecution void as *ex post facto* where it intrudes into the special relationship and personnel practices between a judge and his lawfully appointed personal assistant exclusively within the jurisdiction, domain and supervision of the administrative board of the state's unified court system, as specifically mandated by the state statute and the New York State Constitution, upon which appellant and all other judges within the state's unified court system have traditionally relied?

Statement

The Pre-Trial Proceedings

On September 19th, 1972, the Governor of the State of New York issued Executive Order No. 58 (App. B), (9 Official New York Codes, Rules and Regulations, Sec. 1.58) pursuant to the authorization of Section 149 of the Judiciary Law of the State of New York and Article 6, Section 27 of the New York State Constitution, and Section 63 of the Executive Law of the State of New York, establishing an extraordinary special and trial term of the Supreme Court in and for the County of Kings of the State of New York, requiring the selection of a special grand jury for said term, and directing the appellee Attorney General of the State of New York, in person or by one of his deputies, to investigate and prosecute all corrupt acts committed by public servants arising out of, relating to or in any way connected with the enforcement of law or administration of criminal justice in the City of New York (App. B)

On October 13th, 1972, the Governor issued Executive Order 64 (9 N.Y.C.R.R. 1.64), designating and appointing the appellee Hon. John M. Murtagh, as Justice of the Supreme Court of the State of New York, to preside over the Extraordinary Special and Trial Term for the County of Kings and to cause to be drawn a jury to serve at the said Term (App. B).

Appellant was a Judge of the Civil Court of the City of New York, having served since 1957 as a member of that Court. His law secretary, officially designated as a personal assistant, was one Theodore Mann, a duly qualified attorney at law, who was appointed on September 1, 1972.

On April 17, 1974, appellee Nadjari filed an indictment in the Extraordinary Special and Trial Term of the Supreme Court, County of Kings, charging appellant with the alleged crimes of conspiracy in the third degree, grand larceny in the second degree, perjury in the first degree and tampering with a witness.

In substance, the conspiracy and grand larceny counts, of which Mr. Mann was separately indicted, was that the latter had

"performed little or no work" as law secretary to Judge Moritt from September 18, 1972 to January 24, 1974.*

Under the laws of New York, all personnel practices, including appointments, discharges, leaves of absence, sick leaves, vacation and time allowances, etc., of all non-judicial personnel of New York's unified court system are exclusively controlled and regulated, and are within the sole jurisdiction of the administrative board of the Judicial Conference of the State of New York (Article VI, Sect. 28 of the Constitution of the State of New York; Section 212 Judiciary Law, sub. 1 (App. B)).

The conclusive fact is that no rule, regulation or order had been promulgated by the administrative board which did in any way restrict the total and exclusive supervision exercised by the judges over the personnel practices of their law secretaries or clerks within the unified court system of the State of New York.

Subsequent to the filing of the indictment, on July 3rd, 1974, pursuant to Section 149, subd. 1, Judiciary Law (App. B) appellant was granted the discretionary permission of a Justice of the Appellate Division of the Supreme Court to apply to that Court for pre-trial relief to dismiss the indictment on several constitutional and jurisdictional grounds. Among the relief requested was a motion to dismiss the indictment on the ground of the prosecutorial misconduct of appellee Nadjari in wilfully suppressing vital and material evidence before the grand jury which would have completely exonerated appellant of the un-

*As to the baseless perjury and tampering counts, relating to a statement purportedly made by Judge Moritt to Mr. Mann's law clerk, that "defendant swore falsely when he testified that he had at no time told anyone that he knew the names of a half-dozen Judges' secretaries who never report to work", the obvious fact is that it would have been physically impossible for Judge Moritt to have known of his own knowledge whether other judges' secretaries "never report to work." Moreover, no proper foundation had been laid therefor before the grand jury and Judge Moritt's testimony had been wrongfully elicited for the sole purpose of laying the groundwork for a "perjury" prosecution rather than to discover the truth (*Bronston v. United States*, 409 US 352; *United States v. Lardieri*, 497 F.2d 317).

founded charges contained in the indictment. In addition, appellant moved to dismiss the indictment on the ground that the evidence adduced before the grand jury did not constitute a crime.

On November 12th, 1974, the Appellate Division denied the appellant's original application for pre-trial relief, including the aforesaid motions to dismiss the indictment. No oral argument was permitted by the Court although duly requested by appellant. (*Matter of Moritt v. Nadjari*, 46 App.Div. 2d 784 (NY 1974). In its opinion, the Court stated in part:

> "In connection with the substantive attack made on the various counts of the indictment, we have examined the Grand Jury minutes. While the theory underlying the charge of grand larceny is thin and the proof in regard thereto quite tenuous, they are nevertheless sufficient to require a denial of the defendant's motion to dismiss.
>
> We have considered the other contentions raised by the defendant and find them to be without merit."

The said order of the Appellate Division was not directly appealable under New York law.

On November 27th, 1974, appellant moved for re-argument upon the specific ground that the denial on the merits of appellant's petition to dismiss the indictment for gross prosecutorial misconduct, without a full-scale factual hearing, and without opportunity to argue, was violative of his right to due process of law, and to the equal protection of the laws. (*Westervelt v. Gregg*, 12 N.Y.2d 202; *Wong Yong Sung v. McGrath*, 339 U.S. 33; *Burgett v. Texas*, 389 U.S. 109). On December 27th, 1974, the Appellate Division denied reargument.

Subsequently, during the pendency of appellant's case before the Extraordinary Term of the Supreme Court, appellant moved the Appellate Division to amend its original order of November 12th, 1974, so as to provide that the denial on the merits,

without a hearing, of his motion to dismiss the indictment in that Court, be "without prejudice to re-consideration and renewal thereof by the Extraordinary Special and Trial Term of the Supreme Court". On May 14th, 1975, the Appellate Division denied appellant's application to amend.

Again, on January 15, 1975, the Appellate Division denied appellant's motion for renewal and reconsideration of his motions to dismiss the indictment, filed upon the specific documented ground that appellee Nadjari had publicly acknowledged on December 18, 1974 that the employment by a judge of an alleged "no-show" law secretary "did not constitute an indictable crime", and that "we need new legislation for that."

Thereafter, as required by the Criminal Procedure Law of New York, Sec. 255.20, appellant filed a series of omnibus motions in the Extraordinary Term of the Supreme Court as follows: To dismiss the indictment on the ground that Section 149 of the Judiciary Law is inherently void on its face, and Section 63 of the Executive Law, as applied, under the Due Process clause of the Constitution; to dismiss the indictment in the interest of justice for gross prosecutorial misconduct shocking to the conscience violative of due process of law; to dismiss the indictment as unconstitutionally *ex post facto* and selectively discriminatory in nature under the Due Process Clause of the Constitution; to stay all proceedings pending final determination of the constitutional issues raised herein.

The Article 78 Proceeding—The Order Appealed From

Subsequent to the original proceeding instituted in the Appellate Division under Sec. 149 of the Judiciary Law, as aforesaid, on November 25th, 1974, appellant instituted a special proceeding in the Appellate Division, Second Judicial Department, of the Supreme Court of the State of New York, for an order under Article 78 of the Civil Practice Law and Rules, to prohibit the appellees from proceeding with the trial of the indictment, and for dismissal of the indictment under the 5th and 14th Amendments of the Constitution of the United States, and Article 1, Sec. 6 of the New York State Constitution, upon the following grounds:

1. That the statute under and by which the appellee Extraordinary Special and Trial Term of the Supreme Court was convened, to wit, *Sec. 149, subd. 1 of the Judiciary Law of New York*, is unconstitutional and void on its face as inherently violative of the independence of the judiciary and the Separation of Powers guaranteed against encroachment by the Due Process Clause of the federal and state constitutions.

2. That the same statute, *Sec. 149 of the Judiciary Law of New York, subd. 2* thereof, is unconstitutional and void on its face, as inherently violative of appellant's right to procedural due process and to the equal protection of the laws under the Constitution.

3. That the appellee Nadjari, unconstitutionally misapplied the state's penal laws by illegally usurping the exclusive jurisdiction vested in the administrative board of the Judicial Conference of the State of New York over the administrative supervision of the unified court system, as provided in Article 6, Sec. 28 of the New York State Constitution, and Section 212 of the Judiciary Law of the State of New York, rendering the indictment against appellant invalidly retroactive, in violation of the 5th and 14th Amendments and Article I, Sec. 9 of the Constitution of the United States forbidding *ex post facto* enforcement of the criminal laws.*

Under New York Law, an Article 78 proceeding is an appropriate vehicle for contesting state action on jurisdictional or constitutional grounds (*Matter of Hogan v. Court of General Sessions*, 296 NY 1, 8; *People ex rel. SL & T Co. v. Extraordinary Term of Supreme Court*, 220 NY 487; *Matter of Reynolds v. Cropsey*, 241 NY 389; *Kovarsky v. Housing & Development*, 31 NY2d 184, 286 N.E.2d 882; *Dunn & Bradstreet, Inc. v. City of New York*, 276 NY 198, 11 N.E.2d 728:

*The petition further contended therein that the appellee Nadjari usurped jurisdiction in that his authority to act was strictly limited to the criminal justice system in the City of New York, by the requirements contained in the Governor's Executive Order, and that the acts charged against appellant were in no way connected with the criminal justice system or the enforcement of law. The construction of a state statute is not reviewable in this court (*Guaranty Trust Co. v. Blodgett*, 287 U.S. 509).

Socha v. Smith, 24 NY 2d 400; *Civil Practice Law and Rules, Article 78* (McKinney's Consolidated Laws of New York, Book 7B).

The Article 78 proceeding aforesaid was instituted in the Appellate Division as an original proceeding by mandate of New York's Civil Practice Law and Rules, Section 506(b)(1), which requires that an Article 78 proceeding against a respondent Justice of the Supreme Court must be initially instituted in the Appellate Division, rather than in the State Supreme Court.

Again, no oral argument was had or permitted on appellant's Article 78 petition.

On December 24, 1974, the Appellate Division dismissed the petition "on the merits", without opinion, (App. A), resulting in the Judgment appealed from herein.

POINT I.

SECTION 149 JUDICIARY LAW, SUBD. 1 AND ART. 6, SEC. 27 OF THE NEW YORK STATE CONSTITUTION, ARE FACIALLY UNCONSTITUTIONAL AS VIOLATIVE OF THE INDEPENDENCE OF THE JUDICIARY AND THE SEPARATION OF POWERS GUARANTEED AGAINST ENCROACHMENT BY THE DUE PROCESS CLAUSE OF THE CONSTITUTION OF THE UNITED STATES AND ARTICLE 1, SEC. 6 NEW YORK STATE CONSTITUTION.

Section 149 Judiciary Law, subd. 1, provides:

Sec. 149. Governor may appoint extraordinary terms and name justices to hold them.

"1. The governor may, when in his opinion the public interest requires, appoint one or more extraordinary special or trial terms of the supreme court. He must designate the time and place of holding the same, the name the justice who shall hold or preside at such term, and he must give notice of the appointment in such manner as, in his judgment, the public interest requires. *The governor may terminate the assignment of the*

justice named by him to hold a term appointed pursuant to this section, and may name another justice in his place to hold the same term." (italics ours)

The substantially identical counterpart of *Section 149 Judiciary Law*, namely, *Article 6, Section 27 of the New York State Constitution*, was adopted on November 7, 1961, eff. September 1, 1962. In *haec verba*, it incorporated into the Constitution substantially the same provisions of *Section 149, subd. 1, Judiciary Law*, as aforestated. (App. B, p. 34).

Significantly, there appears to have been no legislative debate, Judicial Conference report, or Bar Association recommendations or discussion regarding the new Constitutional enactment. It simply became part of the new *Article 6* dealing with the Judiciary in general, which created a unified court system, consisting of 38 separate sections of which Article 6, Sec. 27 was one.

In the absolute power thus vested in the Governor to appoint and to remove at will any judge designated by him to hold the Extraordinary Special and Trial Term of the Supreme Court, both Article 6, Section 27 of the New York State Constitution and Section 149 of the Judiciary Law are unconstitutional and void, on their very face, as inherently violative of the independence of the judiciary, and the Separation of Powers guaranteed against encroachment by the Due Process Clause of the Fifth and Fourteenth Amendments of the Constitution of the United States and Article 1, Section 6 of the New York State Constitution.

The fatal flaw of the statute and constitutional provision in issue is that in its in-built potential of control by the Governor over any judge appointed by him, it is unconstitutional per se.

The cardinal principle laid down by the United States Supreme Court is that the constitutionality of a measure depends not on the degree of its exercise but on its principle. (*Providence Bank v. Billings*, 29 U.S. 514, 7 L.Ed. 399).

In *Stuart v. Palmer*, 74 N.Y. 183, 189, the Court long ago laid down the seminal test of constitutionality:

> "The constitutional validity of law is to be tested, not by what has been done under it, but by what may, by its authority, be done."

Again, in *Rosalsky v. State*, 254 N.Y. 117 (1930), the Court stated:

> "We measure the validity of statutes, not by what has actually been done under cover of their provisions, but by what with reason may be done. Stuart v. Palmer, 74 N.Y. 183, 30 AM Rep. 289; Matter of Richardson, 247 N.Y. 401, 421, 160 NY 655."

In *People v. Klinck Packing Co.*, 214 N.Y. 121, 138-139 (1915), the Court reiterated the applicable rule:

> ". . . we are to judge of a statute by what is possible under it. In the absence of any guide it might very well happen that an administrative officer with the best of purposes would nevertheless be very fallible in the execution of them."

Stuart v. Palmer, supra, has been quoted with approval by this Court in *Montana Co. v. St. Louis Mining & Co.*, 152 U.S. 160, 169 (1894); *Farmer Grain Co. v. Langer*, 273 F.Rep. 635, 647 (CA 8, 1921).

The doctrine of Separation of Powers in our constitutional system of government by checks and balances is a "bulwark against tyranny" (*United States v. Brown*, 381 U.S. 437 (1965).

Its fundamental tenets are embodied in the Due Process Clause of the State Constitution, *Article 1, Section 6*, no less than in the Fifth and Fourteenth Amendments of the federal Constitution.

In *Still v. Corning*, 15 N.Y. 297, 303, the Court stated:

> "The leading feature of the Constitution is the separation and distribution of the powers of the

government. It takes care to separate the executive, legislative and judicial powers, and to define their limits. The executive can do no legislative act, nor the legislature any executive act, and neither can exercise judiciary authority." *Cooley's Constitutional Limitations*, 8th ed. Vol 1, p. 355.

Accord: *Matter of Guden*, 171 N.Y. 529, 531; *People ex rel Burby v. Howland*, 155 N.Y. 270, 288.

The settled law is that a provision in a state constitution is subject to the same statutory rules of construction, consistent with the due process clause of the federal constitution, as any state statute.

In *Matter of Wendell v. Lavin*, 246 N.Y. 115, 123, the New York Court of Appeals declared:

"The same rules apply to the construction of a Constitution as to that of statute law. (People ex rel Jackson v. Potter, 47 N.Y. 375, pp. 379-380)."

Accord: *Newell v. People*, 7 N.Y. 9.

". . . there is no liberty, if the power of judging be not separated from the legislative and executive powers". (*The Federalist*, No. 78, A. Hamilton, Modern Library ed. P 504). "Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by the Constitution." (*Holohan v. United States*, 294 U.S. at p. 113).

Accordingly, if *Article 6, Section 27* of the New York State Constitution, here in issue, is inherently offensive to the Due Process Clause of the federal and state constitutions, it must be invalidated as unconstitutional and void.

Mr. Justice Cardozo's learned opinion in *People ex rel. SL&T Co. v. Extraordinary Term of the Supreme Court*, 220 N.Y. 487, and in *Matter of Reynolds v. Cropsey*, 241 N.Y. 389 — both cases involving a construction of the very statute in issue herein, in its pre-amended form — emphatically attest to the fundamental constitutional questions propounded by the appellant herein.

The gravely pernicious potentials of the statute in issue are readily apparent.

The independence of the judiciary is automatically subjugated to the control, whim and caprice of the Executive. The power to hire and fire a judge puts the Executive implacably "in control of judicial action" (*People ex rel S.L. & T. Co. v. Extraordinary Term*, 220 N.Y. 487).

A judge so compromised would be inevitably impelled to tilt the balanced scales of justice against any accused, if only to curry the favor on the one hand, or avert the retribution of the Governor, on the other. In a court of justice so heavily stacked against the accused, with the Governor holding the strings of both the judge and prosecutor, the elemental rights to a fair trial are hopelessly compromised. No judge so situated could reasonably maintain the balance true, despite the best of intentions and the highest nobility of motive.

To expect any judge or court, so situated, to maintain an even balance of judicial objectivity under these unique and extraordinary circumstances, would be to strain for the fulfillment of the impossible from any human being.

In re Murchison, 349 U.S. 133 (1965), the Court stated:

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. *But our system of law has always endeavored to prevent even the probability of unfairness.* To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court had said, however, that every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the

balance nice, clear and true between the State and the accused, denies the latter due process of law. 'Tumey v. Ohio, 273 U.S. 510, 532, 71 L.ed. 749, 758, 47 S.Ct. 437, 50 ALR 1243. *Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'* Offutt v. United States, 348 U.S. 11, 99 L.ed. 11, 75 S.Ct. 11." (Emphasis ours)

In *United States v. Walter*, 473 F.2d 136 (CA, D.C. (1972), the Court noted:

"The disciplined judicial mind should not be subjected to any unnecessary strain; even the most austere intellect has a subconscious."

With the utmost deference and the highest respect and esteem for the distinguished appellee Justice, the Hon. John M. Murtagh, the extraordinary pressures subtly operative against any judge so situated could not but have been reflected in the conduct of trial in the cases before the Extraordinary Term of the Supreme Court. The reported decisions of appellate tribunals in corrective action graphically portray the predicament in which defendants have been placed under the unconstitutionally structured statutes at bar. e.g., *People v. Johnson*, 46 App.Div.2d 123, 127 (1975); *People v. Bell*, 45 App.Div.2d 362, 364, affd by New York Court of Appeals (*N.Y. Times*, Nov. 20, 1975; *People v. Harding*, 33 App.Div.2d 800 (1974); *People v. Levy*, 47 App.Div. 2d 12 (1975); *People v. Mackel*, 47 App.Div.2d 209 (1975).

Granted that the appellee Justice has displayed commendable judicial impartiality and fairness in several recently reported cases on jurisdictional issues (*Matter of Goldman*, ——Misc. 2d—— (1975); *People v. Geller*, ——Misc. 2d——, New York Times, Nov. 18, 1975, p. 61, the fact is nevertheless that this indictment had been originally spawned against appellant under color of the unconstitutional statutes in issue. Further, the

ultimate test of constitutionality is that the statute must be judged "by what is possible under it" (*Stuart v. Palmer*, 74 NY 183, quoted with approval by this Court in *Montana Co. v. St. Louis Mining Co.*, 152 US 160, 169 (1894); *Farmer Grain Co. v. Langer*, 273 F.Rep. 635 (CA 8, 1921)).

That this question is so substantial as to require plenary consideration by the Supreme Court of the United States for its resolution is readily attested by the fact that the state statute in issue is an identical replica of the tyrannical power exercised by King George III over the colonial governments, through his royal governors, by systematically appointing and controlling his own judges and prosecutors. "He has made Judges dependent on his Will alone, for the tenure of their offices,***" (*Declaration of Independence, July 4, 1776*).

It matters not that the unfettered power thus vested in the Governor springs from the highest motives in the rooting out of a festering corruption within the criminal justice system. "Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." (*NAACP v. Alabama*, 377 U.S. 288, 307).

United States ex rel. Monty v. McQuillan, 385 F.Supp. 1308 (EDNY 1974), affd. 516 F.2d 897 (CA 2, 1975), and *People v. Davis*, 67 Misc.2d 14, cited by appellee Nadjari, are both totally inapposite. (Motion to Dismiss, pp. 7-9). The issue presented in these cases was strictly limited to the Governor's prescribed statutory power to designate a particular judge under Section 149, subd. 1, Judiciary Law (App. 36), without more. No challenge was made therein, however, to the Governor's unconstitutionally delegated power to terminate the assignment of the justice appointed by him, by dictatorial fiat at any time, and to appoint another justice in his place to hold the same term.

Again, appellee Nadjari misleadingly quotes the Cardozo court in *People ex rel. Saranac Land & Timber Co. v. Extraordinary Term of Supreme Court*, 220 NY 487, 492 (1917), as

follows: "Aside from the power to assign and remove the justice, the Governor 'has no power to do more', and he 'has not attempted to do more'." The fact is, however, that the power to remove the justice was added to the statute in issue long after the Cardozo court had rendered its decision in the *Saranac* case.

The appellee blandly asserts to this Court that "the additional power of the Governor to terminate the assignment and name another justice to hold the term is one of necessity, occasioned by the possibility that a presently assigned justice may become unable or unwilling to continue his position" (Motion to Dismiss, p. 9). This is to disregard the critical fact that in no other case is the Governor given the absolute judicial power to play musical chairs with the assignment of judges of the Supreme Court, a matter strictly reserved to the Appellate Division alone under New York's Judiciary Law (App. B, pp. 35-36).

Appellee Nadjari erroneously contends that "the federal separation of powers doctrine does not apply to the states", citing *Dreyer v. Illinois*, 187 US 71, 84 (1902). (Motion to Dismiss, p. 10). In that case, however, this Court plainly stated:

> "Whether the legislative, executive and judicial powers of a state shall be kept *altogether* distinct and separate, or whether persons or collections of persons belonging to one department may, *in some respect to some matters*, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state." (Emphasis supplied)

In other words, *Dreyer v. Illinois* stands for the proposition that a mere overlapping of some powers is not necessarily violative of the separation of power doctrine. Said the Court:

> "The true meaning is, that the *whole power* of one of these departments should not be exercised by the same hands ***" (Emphasis supplied).

In conferring upon the Governor the whole power to appoint and to terminate the tenure of judges' assignments, the encroachment by the executive over the judiciary has thereby transcended all constitutional limits.

POINT II

SECTION 149, SUBDIVISION 2 OF THE JUDICIARY LAW, IN SUBSTANTIALLY DIMINISHING THE RIGHTS OF LITIGANTS BEFORE THE EXTRAORDINARY TERM, IS UNCONSTITUTIONAL AND VOID ON ITS FACE, AS INHERENTLY VIOLATIVE OF THE EQUAL PROTECTION OF THE LAWS AND DUE PROCESS OF LAW.

Gravely compounding the evil potentials of *Section 149 Judiciary Law*, a further amendment of the same statute also destroyed the equal protection of the laws for all litigants in the Appellate Court by severely diminishing their pre-trial procedural rights to a fair and impartial trial (*cf. People ex rel. S.L. & T. Co. v. Extraordinary Term*, 220 N.Y. 487, per by Judge Cardozo; *Matter of Cropsey, supra*).

Originally, every defendant at the bar of the Extraordinary Term had the absolute right to present any pretrial motion, viz., to disqualify a judge for bias, to apply for a change of venue, to waive a jury trial, to suppress illegal evidence, etc., to the Special Term of the Supreme Court, rather than exclusively to the Extraordinary Term.

Subsequently, however, the legislature amended *Section 149 of the Judiciary Law*, by enacting a new *subdivision 2* (L. 1953, Ch. 890), substantially diminishing the rights of litigants, as follows:

> "2. A motion involving a matter pending before such extraordinary special or trial term shall be made returnable at such term, or, at the option of the moving party, at a term of the appellate division of the supreme

court in the department in which such extraordinary special or trial term is being held."

However, the statute was once again amended by L. 1960, ch. 164. In place of the saving absolute "option" accorded criminal defendants to make all motions returnable in the appellate division in the supreme court, the new amendment massively diminished the rights of litigants still further by substituting for it the discretionary device of a justice of the appellate division. The amended statute in its present form, now reads as follows:

"2. A motion involving a matter pending before such extraordinary special or trial term shall be made returnable at such term, except that, in the exercise of discretion, a justice of the appellate division of the supreme court in the department in which such extraordinary special or trial term is being held may grant permission for such motion to be heard at a term of such appellate division." (App. p. 36).

In *Roller v. Holly*, 176 U.S. 398, 409, 44 L. ed. 520, 524, 20, this Court held:

"The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion."

Above all, this appellant, as all others similarly situated before the Extraordinary Term, have been deprived of the fundamental right to be tried by a judge randomly chosen. Appellant is now compelled to stand trial before the Governor's personally hand-picked judge and hand-picked Special Prosecutor, both of whom are summarily removable at the instance, will, whim, or caprice of the Executive, in flagrant violation of the principle of separation of powers. By comparison, all other defendants in the regular criminal terms are entitled to assignment of judges selected at random (*Rule 751.5 Supreme Court Rules, Kings County*), and removable only by the Appellate Division, and no other.

In net effect, under the amended statute aforesaid, a litigant is absolutely restricted to the respondent Extraordinary Term

alone for vindication of his rights of due process to a fair and impartial trial, save only for the limited right to apply to the Appellate Division with respect to preliminary matters, subject however, to the over-all discretionary right of a justice of the Appellate Division to grant or withhold such permission (*Section 149, subd. 2 Judiciary Law*).

A defendant before any regular term of the Supreme Court, however, would have the absolute right to move at Special Criminal Term for disqualification of the presiding judge, for a change of venue, or for dismissal of the indictment on due process grounds. These fundamental rights are absolutely denied to all defendants before the appellee court. Even the fixation of excessive bail by the appellee Extraordinary Term is not subject to habeas corpus relief before an independent justice presiding at the regular Special Term of the Supreme Court, as is accorded all other defendants in the regular criminal terms (*People ex rel. Feldman v. Warden*, 45 App. Div. 2d 838 (1st Dept., 1974).

In practical terms, particularly prejudicial to appellant, he would be seriously hard put to avail himself of the fundamental right of waiver of jury trial in the appellee court — especially where, as here, the appellate division below had already definitively determined from inspection of the Grand Jury Minutes that "the theory underlying the charge of grand larceny is thin and the proof in regard thereto quite tenuous." [*Matter of Moritt v. Nadjari*, 46 AD 2d 784 (2d Dept.). Accordingly, if the *ex parte* evidence adduced before the Grand Jury by the appellee Nadjari is of that meager quality, then clearly the trial evidence to be adduced on behalf of the appellant would inevitably require and justify a trial order of dismissal for legal insufficiency of the evidence under New York's Criminal Procedure Law, Sec. 290.10.

Nevertheless, for the reason aforestated directly affecting the independence and impartiality of the judiciary (Point I), the appellant is now effectively foreclosed from a free choice of

waiver of jury trial in the appellee court under the unique circumstances herein presented.

Again, in sharp contrast to the fixed general rule in the appellate division that "a motion or proceeding will be deemed submitted to the court without oral argument", all other defendants at the bar of the regular criminal terms of the Supreme Court are by court rule granted the important right to argue orally all contested motions. (Rules Sec. 670.3(b) Supreme Court Rules Kings County, 22 NYCRR, Sec. 752.11). Here, appellant had been denied a fair and equal opportunity to argue his original motion to that Court submitted under color of Section 149 subd. 2 of the Judiciary Law.

It will be noted that even in a meritorious application to disqualify the presiding justice for bias or interest, there would be no other justice to take his place, for there is but a single judge appointed by the Executive to preside in the Appellee Court, the Extraordinary Term of the Supreme Court. To replace that justice for bias or interest would necessarily entail that the Governor designate an alternate judge in his place by new executive order in each such case, thus superimposing a serious practical road block in the path of any defendant at the bar of the Extraordinary Term, to the equal protection of the laws, as compared to all other defendants within the jurisdiction of the regular criminal terms of the Supreme Court.

As to the alternate discretionary right of any defendant to apply to the Appellate Division for permission to file a pre-trial motion or proceeding, authorized by Sec. 149 Judiciary Law, subd. 2, it is hornbook constitutional law that a grant of discretion is no fair or adequate substitute for the absolute right accorded all other defendants in the regular criminal terms to institute all pre-trial proceedings at an independent term. (*Roller v. Holly*, 176 U.S. 398, 409).

It will be noted, in this connection, that although the Appellate Division had denied appellant's application to dismiss the indictment for gross prosecutorial misconduct shocking to the conscience, *without a hearing*, a complaint subsequently filed by Judge Moritt under Title 42 USC 1983 for deprivation of civil rights, pleading the identical acts alleged in the state court

proceedings hereinabove, was subsequently upheld by Chief Judge Mishler in the U.S. District Court for the Eastern District of New York, on Appellee Nadjari's motion to dismiss. (*Moritt v. Nadjari*, et al. ——F. Supp. —— August 27, 1975).

In sum, every litigant at the bar of criminal justice before the appellee Extraordinary Special and Trial Term of the Supreme Court is effectively deprived of the equal protection of the laws accorded all other criminal defendants in the regularly constituted terms of the Supreme Court.

The appellees contend that "the use of sound judicial discretion is not uncommon to state or federal courts in setting bail, imposing sentence or granting leave to appeal, or this Court in granting certiorari." (Motion to Dismiss, p. 12).

We respectfully submit, in answer, that since the normal exercise of discretion is and should be universally applicable to all criminal defendants alike, the absolute discretion vested in the appellate division to grant or deny an application to entertain pretrial motions is intrinsically violative of appellant's right to the equal protection of the laws accorded to all other defendants of the Criminal Term of the Supreme Court, who are limited by no such discretion in their right to pretrial relief.

POINT III

THE GOVERNOR'S SPECIFIC DESIGNATION OF THE APPELLEE NADJARI TO MANAGE AND CONDUCT ALL PROCEEDINGS IN THE EXTRAORDINARY TERM OF THE SUPREME COURT RENDERED SECTION 63 EXECUTIVE LAW AND EXECUTIVE ORDER NO. 58 UNCONSTITUTIONAL AND VOID, AS APPLIED, UNDER THE DUE PROCESS CLAUSE OF THE CONSTITUTION.

The personal designation of the prosecutor by the Governor infinitely compounded the threat against the independence of the judiciary, by arrogating unto the Executive, likewise, the constitutional functions of the quasi-judicial, independently-elected office of appellee Attorney General of the State of New York (Article 5, Sec. 1 New York State Constitution), and

flagrantly violated the specific mandate of Section 63 of the Executive Law of New York that the Attorney General "attend in person, or by one of his deputies" before the Extraordinary Term.

Section 63 Executive Law, implementive of and complementary to *Section 149 Judiciary Law* aforestated, provides in pertinent part as follows:

> "*Section 63. General Duties.* The Attorney General shall:
>
> 1. Prosecute and defend all actions and proceedings in which the state is interested, and have charge and control of all the legal business of the departments and bureaus of the state, or of any office thereof which requires the services of attorney or counsel, in order to protect the interests of the state***.
>
> 2. Whenever required by the governor, *attend in person, or by one of his deputies*, any term of the supreme court or appear before the grand jury thereof for the purpose of managing and conducting in such court or before such jury criminal actions or proceedings as shall be specified in such requirement***." (Emphasis ours.)

Notwithstanding the explicit requirement contained in *Section 63 Executive Law* that the Attorney General "attend in person, or by one of his deputies", the fact that the Governor personally and officially directed the Attorney General to appoint the appellee Nadjari is a matter of common knowledge of which the Court may properly take judicial notice. (*Hunter v. New York, Ont. & West. RR Co.*, 116 NY 615; *20 Amer. Jur. Evid. Sec. 23;*

By designating his own Special Prosecutor to manage and conduct all proceedings in the court so controlled by the Executive as aforesaid, the Governor has not only magnified the potential dangers of *Section 149 Judiciary Law* to the independence of the judiciary and to the due process rights of an accused, but has likewise rendered *Section 63 Executive Law*

and *Executive Order No. 58* issued thereunder, unconstitutional and void, *as applied*, under the Due Process Clause of the Constitution.

The unchecked power vested in the Governor by *Section 149 Judiciary Law* to appoint the Justice presiding in the appellee Court and to remove him at will, for any cause or no cause — and, in the very context of such a controlled court, to sanction the right of the Governor to hand-pick and control the designation of a particular Special Prosecutor to manage and conduct all proceedings therein — would tend to invite and encourage the very tyrannical abuses practiced by the appellee Nadjari at bar, not only against this appellant but against a host of others similarly situated, as reflected in a proliferating number of reported cases.

It is no mere coincidence that, under goad of a court structure so wholly controlled by the Executive, that an abnormal number of defendants at the bar of the appellee court have been compelled to interpose special defenses charging appellee Nadjari with wilful entrapment, subornation of perjury, prosecutorial misconduct shocking to the conscience, refusal to arraign defendants at any time following arrests, lack of jurisdiction, and notoriously unfair trial tactics. (See *United States v. Archer*, 486 F.2d 670 (CA2); *People v. Steinman*, 44 App. Div. 2d 839 (2d Dept. 1974); *Matter of Klein v. Murtagh*, 44 App. Div. 2d 465 (2d Dept. 1974); *People v. Mackel*, 47 App.Div. 2d 209 (1975); *Matter of Goldman*, ——Misc.2d—— (1975); *People v. Geller*, ——Misc. 2d——, *N.Y. Times*, Nov. 18, 1975, p. 61); *People v. Levy*, 47 App.Div.2d 12 (1975); *People v. Bell*, 45 App.Div. 2d 362 (1st Dept.); *People v. Johnson*, 46 App.Div. 2d 123, 127 (1975); *Lopez v. Nadjari*, U.S.D.C., E.D.N.Y. 1974 (Civil suit for illegal wiretapping of telephone conversation between attorney and client); *People v. Harding*, 44 App.Div.2d 800 (1st Dept).

In *People v. Nigrone*, 46 App. Div. 2d 343 (2d Dept. 1975), the Court unequivocally remarked of appellee Nadjari: "Such a perversion of the criminal justice system by an overzealous prosecutor is illegal, outrageous and intolerable and we con-

demn it." In similar vein, federal Judge McMahon recently characterized appellee Nadjari's mispractices as "foul, illegal and outrageous." (*Rao v. Nadjari,* —— F Supp ——, USDC, SD N.Y. (October 2, 1975).

In sum, we respectfully submit that *Section 63 Executive Law* and *Executive Order No. 58* are unconstitutional and void, *as applied,* under the Fifth and Fourteenth Amendments of the Constitution of the United States and Article 1, Sec. 6 of the New York State Constitution.

A statute may be deemed unlawful and unconstitutional, as applied. (*Steffel v. Thompson,* 415 US 452, ff. 7, (1974); *Younger v. Harris,* 401 US 37; *Samuels v. Mackell,* 401 US 66; *Sands v. Wainwright,* 491 F. 2d 417 (CA 5, 1973).

The appellees Nadjari, as well as the Attorney General, have studiously avoided denying or controverting Appellant's due process contention that the Governor's personal designation of Nadjari to manage and conduct all proceedings in the unconstitutionally structured court likewise rendered *Section 63 Executive Law* and Executive Order 58 unconstitutional and void, as applied.

The appellees glibly fob off this contention by merely stating that any argument "that the Governor's designation of the Attorney General was improperly executed is again an attack on an act, not a statute." (Motion to Dismiss, p. 13).

The fact is, however, as alleged in the Article 78 state proceeding below, the Governor had in fact personally designated the appellee Nadjari as a Special Deputy Attorney General to manage and conduct the proceedings in the Governor's own handpicked court—in flagrant violation, not only of the independence of the judiciary, but also of the independence and autonomy of the constitutionally-elected office of Attorney General. If so, then appellant's right to due process of law has been immeasurably compromised.

Neither appellee Nadjari nor the Attorney General have

candidly faced up to this central issue in their submission either to this Court, or in the State courts below.

In *Field v. Boyle,* 503 F2d 774 (1974), the Court stated:

> "*** due process questions under the Federal Constitution may be presented either by the failure of a state to follow its own rules of law or by state rules of law themselves serving as a deprivation of due process".

This Court has held that:

> "The history of American freedom is in no small measure the history of procedure." (*Malinski v. New York,* 324 U.S. 401, 419)

POINT IV

THE INDICTMENT IS UNCONSTITUTIONAL AND VOID AS EX POST FACTO.

To permit a prosecutor to engage in an *ex post facto* prosecution of this nature would directly undermine the fundamental independence of the judiciary with respect to the traditional official relationship subsisting between a judge and his law assistant in the regular performance of judicial duties, upon which this appellant and all other judges in the unified court system have relied. If this appellant be rendered retroactively vulnerable to the harassment and threat of a criminal prosecution over a matter strictly within the exclusive jurisdiction of the judiciary, then every judge or his law assistant in the land could be no less in jeopardy at the hands of a wilful and malicious prosecutor. Every judge and his law assistant would be hostage to the design of an ambitious, overzealous or tyrannical prosecutor. A state cannot, by judicial decision or otherwise, remove any of its activites from the inhibitions of the 14th Amendment. (*City of St. Petersburg v. Alsup,* 238 F.2d 830, cert. den. 353 US 922).

A law that makes an action done before its enactment criminal, and which was innocent when done, is *ex post facto. Calder v. Bull,* 3 U.S. 386 (1798); *Bouie v. Columbia,* 378 U.S. 347, 353 (1964); *United States v. Nill,* 518 F2d 793 CA 5, 1975). The criminal statutes of grand larceny and conspiracy, as here applied against appellant, are clearly invalidly retroactive and an *ex post facto* exercise of jurisdiction. *Williams v. United States,* 179 F.2d 644, aff. 341 US 70; *Love v. Fitzharris,* 460 F2d 382, vacated 409 US 1100).

The indictment procured by the appellee Nadjari against appellant usurped the exclusive jurisdiction of the administrative supervision of the courts, as provided for by *Article VI, Section 28 New York State Constitution,* and as implemented by *Article 7A Judiciary Law,* more particularly *Sections 212 and 222* thereof relating to "personal practices, title structure, job definition, classification, qualifications, appointments, promotions, transfers, leaves of absence, resignations and reinstatements, performance rating, sick leaves, vacations, time allowances and removal of non-judicial personnel of the unified court system", and in accord with long-standing tradition and standard practice thereunder, upon which the Appellant, Judge Moritt, relied.

Pursuant to the mandate of the Constitution, the legislature enacted laws implementing the Constitution with *Article VII A Judiciary Law,* more particularly Section 212 which provides:

> "The administrative board shall have the authority and responsibility for the administrative supervision of the unified court system. In discharge of that authority and responsibility the administrative board, in consultation with the judicial conference, may adopt, amend, rescind and make effective standards and policies for general application throughout the state,***"

Section 212 of the Judiciary Law, subd. 1, provides in part:

> "1. *Personnel practices, title structure, job definition, classification, qualifications, appointments, promotions, transfers, leaves of absence, resignations and reinstatements, performance rating, sick leaves, vacations, time allowances and removal of non-judicial personnel of the unified court system.* *** Before adopting new standards and policies which affect the non-judicial personnel, the administrative board shall give notice of the proposed new standards and policies and shall give notice of and hold a hearing at which affected employees or their representatives shall have the opportunity to submit criticisms, objections, and suggestions relating to such proposed standards and policies."

The administrative board has placed only one restriction upon the appointment of personal assistants (secretary) to the justices, to wit, that said personal assistants shall be attorneys, but has not imposed any other requirements or restrictions as set forth in *subdivision 1 of Section 212 Judiciary Law.*

Appellant relied upon the law as aforestated in engaging Theodore Mann, an attorney, as his secretary and complied fully with its mandates.

In *Matter of Spindel v. Dudley* (unreported), Supreme Court, New York County, New York Law Journal, June 4, 1974, the Court stated:

> "For the nature of the Secretary's work is wholly defined by the individual Justice, and is to a large extent unrelated to a five-day week, eight-hour schedule. The Secretary may be as much on the job when at home, actually ill, but reading and evaluating briefs, papers in the court file, decisions and precedents, or conferring with the Justice by telephone, as when he is physically present in chambers."

Indeed, in conclusive confirmation of appellant's contention herein, the appellee Nadjari had publicly declared and acknowledged that the employment of alleged "no-show Law Secretaries to Justices of the Supreme Court "is not an indictable

crime" with respect to the "rip-off" salaries paid to them, because "we need new legislation for that." (*New York Daily News, December 19, 1974*).

POINT V

THE CONSTITUTIONAL QUESTIONS PRESENTED IN THIS APPEAL ARE SUBSTANTIAL.

As is plainly manifest, each of the constitutional issues presented in this appeal are substantial (*Zucht v. King*, 260 US 174, 177; *Rule 15(e) Rules of the Supreme Court.*

In dismissing the appeal taken as of right under New York law pursuant to Civil Practice Law and Rules 5601(b), on the purported ground that "no substantial constitutional question is directly involved" and in summarily denying the appellant leave to appeal, the Court of Appeals failed to adhere to its standard precedents laid down in its own prior decisions in *People ex rel S.L. & T. Co. v. Extraordinary Term of the Supreme Court, supra*, Cardozo, J. and in *Matter of Reynolds v. Cropsey, supra*, construing the very statute here in issue in its preamended form. It was after the Cardozo decision in *Saranac* that the legislature made the statute repugnant to the Constitution by enacting new legislation allowing the Governor to remove as well as appoint the special judge of the Governor's own creation. As so reconstituted, it is self-evident that the legislative authorization granted to the Governor to terminate the assignment of a justice appointed by him at will, would never have survived constitutional muster of the Cardozo court.

With all due deference and the utmost respect for the New York Court of Appeals, a state court cannot so construe a state statute as to render it obnoxious to the Federal Constitution. (*Arizona Employer Liability Cases*, 250 US 400; *Crew Levick Co. v. Comm. of Pa.*, 245 US 292). The Supreme Court of the United States is not bound by the determination of the New York Court of Appeals that the constitutional questions are not substantial,

but must reach a conclusion independent of the state court. (*Appleby v. City of New York*, 271 U.S. 364; *Napue v. Illinois*, 360 US 264; *Brookhart v. Janis*, 86 S. Ct. 1245; *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697).

The judgment appealed from herein is a final judgment within the meaning of 28 U.S.C. 1257 (*Gospel Army v. Los Angeles*, 331 U.S. 543, 548; *Dept. of Banking v. Pink*, 317 U.S. 264, 268; *Richfield Oil Corp. v. State Board*, 329 U.S. 69, 72).

Notwithstanding that the constitutional validity of the state statutes here in issue are now technically pending before the appellees Judge Murtagh and his Extraordinary Term of the Supreme Court as aforestated, it is plain that appellant's contentions as to the facial invalidity of Section 149 Judiciary Law go to the very jurisdiction of the unconstitutionally structured Court. If this statute is inherently violative of the independence of the judiciary, then the appellee Court is utterly without jurisdiction or legal competence to resolve the issue of constitutionality or otherwise as a legally constituted Court (*Oakley v. Aspinwall*, 3 N.Y. 547; *Wilcox v. Royal Arcanium*, 210 N.Y. 370, 377; *People v. Whitridge*, 144 App. Div. 493 (N.Y. 1st Dept). The one and only Court properly exercising jurisdiction or legal capacity was the Appellate Division of the Supreme Court below, to which appellant had vainly addressed the proceeding appealed from herein.

In practical terms as well, it would be patently incongruous to beseech the appellees Judge Murtagh and Extraordinary Term of the Supreme Court for a ruling which would enseal the invalidity of the Court's own very existence, and pronounce its own nullity as a legally constituted court; "There can, of course, be no valid prosecution and conviction for crime unless the court in which the prosecution is instituted or carried on is legally created and constituted, or is at least a de facto court." (*22 Corpus Juris Secundum 108, pp. 299-300*).

CONCLUSION

The motion to dismiss the appeal should be denied. The constitutional questions presented herein are so substantial and are of such grave public importance as to require plenary consideration with briefs on the merits and oral argument for their resolution.

Respectfully submitted,

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